

Administrative Conference Committee on Collaborative Governance
FACA Project, Meeting on April 21, 2011
Comments submitted by Committee Member Philip J. Harter

I do have a few thoughts — perish the thought it might be otherwise! — and so I thought I'd pass them along. My points:

Overall, the tenor of the draft recommendation seems to be on FACA and how the new media can facilitate an agency's compliance with FACA while reducing costs and perhaps increasing participation. I think to a large extent that emphasis is backwards: as we discussed briefly at the last meeting, it would be better if the focus were on the new media/technologies and how they can increase public participation and information flow between agencies and the public. Part of that analysis is, to be sure, the application of FACA as well as clarifying what are safe harbors in the use of the technologies without implicating a debilitating FACA.

To that end, I suggest deleting the words "for the use of advisory committees" in the last line of the third paragraph of the Background section. In keeping with my view above, I would also suggest flipping the title to be "The New Technologies and the Federal Advisory Committee Act." The focus there is on the new and what they can achieve on their own and as a means of facilitating compliance with FACA.

I concur with the views of the NGOs that were distributed last week. Perhaps that means that recommendations should be made to agencies to comply with the spirit of FACA with its balance and openness even if FACA does not apply squarely. That would also go a long way toward my view as to how FACA ought to be changed generally.

Perhaps I remain an old-fashioned curmudgeon in this as well as other fields, but I really do not agree that an agency's sequential consultation with a fixed group, as EPA did so proudly in its diesel rule, is not an advisory committee subject to FACA. The agency sought — and worked hard to obtain — the views of a closed group for a preferred source of advice. The fact that each member of the group could not see the nose of the others does not mean it ain't one of those beasts: the word meeting does not appear in the definition.

I would suggest that the Committee consider changing the word "permit" to "encourage" in the second line of Recommendation 2.

In keeping with our discussion at the last meeting, the words "by advisory committees" should be deleted in the third line of the 4th Recommendation.

It might be interesting to have a discussion concerning the position of GSA — and Jim Tozzi — that FACA is not a public participation statute. I certainly agree that that was the case when it was first enacted. But, I am also of the view that as administrative procedures have evolved, so too has FACA. Indeed, it has become the vehicle for Collaborative Governance in which a broad, binding policy is worked out. In fact, one can argue rather forcibly that the original incarnation of § 553 was not participation but rather a means of informing — a/k/a providing advice and information — the agency. The times they do

change. And, like the metamorphous of § 553 itself, the conceptual framework with which people regard it can go a long way towards influencing how it is used and administered.